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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CHARLES L. FREEMAN, et al., H028531

Plaintiffs and Appellants, (Santa Clara County Superior Court No. 1-04 CV014710)

v.

PETER B. LAURITZEN,

Defendant and Respondent.
_____/

Plaintiffs Charles L. Freeman and Kay L. Freeman appeal from a judgment of dismissal entered after the trial court sustained a demurrer to their second amended complaint without leave to amend. The second amended complaint alleged causes of action for professional negligence, fraud, and breach of fiduciary duty against defendant Peter B. Lauritzen. We conclude that plaintiffs failed to state claims that were not barred by the statute of limitations and affirm the judgment.

I. Statement of Facts

On appeal from a judgment dismissing a complaint after a demurrer is sustained without leave to amend, we treat as true the properly pleaded factual allegations of the complaint and the facts of which judicial notice can be taken.

(*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Those allegations and facts are as follows:

Plaintiffs are the nephew and niece of Charles A. Freeman. Elizabeth Freeman was Mr. Freeman's wife. Defendant is the attorney who drafted Mr. Freeman's will.

In 1987, the Freemans purchased a condominium as joint tenants. In 1990, Mr. Freeman executed his will. At issue is the disposition of his interest in the condominium. Paragraph 1.4 of Mr. Freeman's will nominates defendant and Mrs. Freeman as trustees. Paragraph 2.2 refers to the condominium, and provides in relevant part: "Residence. If my spouse survives me, I give to the trustee, in trust, to be held under the provisions of Article Four, all of my right, title and interest (if any) subject to disposition by my will in the real property condominium at 500 Almer Road, Unit 204, Burlingame, California, which is now our home and principal place of residence, ..." The trust created under the will was to terminate on Mrs. Freeman's death. Plaintiffs were residuary beneficiaries of the trust.

In October 1991, Mr. Freeman died. He was survived by Mrs. Freeman and plaintiffs. At the time of his death, the condominium was held in joint tenancy and thus was not transferred to the trust.

On January 22, 1992, Mr. Freeman's will was filed with the court, and became public record. On July 15, 1993, Mrs. Freeman filed a petition for preliminary distribution and confirmation of allocation of community property assets. Paragraph 11 of the petition lists the five legatees under the will. With respect to the trust, it states: "To: Elizabeth N. Freeman and Peter B. Lauritzen, as Trustees [¶] Upon the terms and conditions and for the uses and purposes set forth in Article Four of the decedent's Will, the sum of $100,000.00 (one hundred thousand dollars) cash. *(Although the decedent's Will specifically devised his*

interest in his condominium to said trustees, the condominium was held in joint tenancy between the decedent and his surviving spouse and therefore does not pass under the terms of his Will)." (Italics added.) Defendant sent a copy of the petition for preliminary distribution to plaintiffs, but he did not attach a copy of the will. In July 1993, plaintiffs acknowledged receipt of the petition.

Sometime after July 1993, plaintiffs asked defendant for a copy of Mr. Freeman's will. Defendant made a statement to the effect that plaintiffs "didn't need to read the will, but to rest assured that he . . . was properly and competently handling the matter." Believing that defendant was protecting their interests, plaintiffs made no further attempts to obtain a copy of the will. In December 1993, the petition for final distribution was filed.

In December 2002, Mrs. Freeman died. In April 2003, plaintiffs received a copy of Mr. Freeman's will. On February 20, 2004, plaintiffs filed the present action. Their second amended complaint alleged causes of action for professional negligence, fraud, and breach of fiduciary duty. Finding that these causes of action were barred by the statute of limitations, the trial court granted defendant's demurrer without leave to amend and entered judgment in his favor.

II. Discussion

A. Standard of Review

On appeal from a judgment of dismissal after a demurrer is sustained, "we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action . . . ." (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415.) A complaint fails to state facts sufficient to constitute a cause of action when it discloses on its face that the statute of limitations has run on the causes of action. (*Guardian North Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963, 971-972.)

B. Statute of Limitations

Code of Civil Procedure section 340.6[1] provides in relevant part: "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first." Thus, the limitations period commences when the plaintiff has notice or information of circumstances that are sufficient to put a reasonable person on inquiry. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 395-397.)

Plaintiffs' cause of action for professional negligence alleges that defendant committed malpractice when he failed to ensure that the condominium was transferred to the trust for their benefit upon Mrs. Freeman's death. However, plaintiffs were aware of the factual basis for their claim when Mr. Freeman's will was probated. On January 22, 1992, Mr. Freeman's will was filed with the court and thus was a matter of public record. On July 15, 1993, plaintiffs were served with the petition for preliminary distribution that informed them that the will had been admitted to probate in San Mateo County Superior Court and the condominium would not be transferred to the trust. Shortly thereafter, plaintiffs acknowledged that they were beneficiaries of Mr. Freeman's residuary estate and had received the petition for preliminary distribution. Thus, plaintiffs knew or reasonably should have discovered the facts constituting defendant's wrongful acts or omissions no later than July 1993. Since plaintiffs did not file their complaint

[1] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

by July 1994, the trial court properly found that their cause of action for professional negligence was barred by the statute of limitations.[2]

Plaintiffs argue, however, that it would have been nearly impossible for anyone without legal training to understand the statement regarding the condominium in the petition for preliminary distribution. We disagree.

The petition for preliminary distribution states in relevant part: "Although the decedent's Will specifically devised his interest in his condominium to said trustees, the condominium was held in joint tenancy between the decedent and his surviving spouse and therefore does not pass under the terms of his Will." This statement informed plaintiffs that Mr. Freeman's will provided that his interest in the condominium would be transferred to the trust; the condominium was held in joint tenancy between Mr. and Mrs. Freeman; and the condominium would not be disposed of as provided in the will. Thus, plaintiffs were notified that the terms of the will were in conflict with the manner in which title to the condominium was held, thereby alerting them to potential negligence by defendant.[3]

Even assuming that plaintiffs would not have discovered defendant's malpractice through reasonable diligence by July 1993, their cause of action is barred by the 4-year statute of limitations. Any negligent advice that defendant gave to Mr. Freeman regarding the effect of holding title to the condominium in joint tenancy occurred prior to the execution of the will in 1990. Mr. Freeman

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[2] Plaintiffs' cause of action for breach of fiduciary duty is based on defendant's professional negligence, and thus is also governed by section 340.6. (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 67.) For the same reasons, this claim is barred by the statute of limitations.

[3] Plaintiffs also claim that this "disclosure" was buried in a 15-page document. We disagree with this characterization of the record. The petition for preliminary distribution consists of six pages with nine pages of exhibits. The provisions regarding the proposed preliminary distribution to the five specific legatees is clearly outlined in half a page.

died in October 1991. Since this was the last date on which he could have terminated the joint tenancy, it was the latest possible date that defendant's negligence could have occurred. Thus, plaintiffs' failure to file their claim by October 1995 was barred by the statute of limitations.

Plaintiffs also contend that the limitations period for their claim for professional negligence was tolled under section 340.6, subdivision (a)(1), because they had not sustained "actual injury" until July 2003. At this time, the assets held in trust for Mrs. Freeman, which allegedly should have included Mr. Freeman's community property share of the condominium, were distributed to the trust's remaindermen after her death.

"The test for actual injury under section 340.6 . . . is whether the plaintiff has sustained any damages compensable in an action . . . against an attorney for a wrongful act or omission arising in the performance of professional services." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 (*Jordache*).) "[W]hen malpractice results in the loss of a right, remedy, or interest, . . . there has been actual injury regardless of whether future events may affect the permanency of the injury or the amount of monetary damages eventually incurred." (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 227.) The determination as to when a plaintiff has suffered actual injury is a question of fact, but the issue may be determined as a matter of law when the facts are undisputed. (*Jordache*, at p. 751.)

In the present case, Mr. Freeman's interest in the condominium transferred to Mrs. Freeman upon his death in 1991. At this point, plaintiffs sustained actual injury. Plaintiffs, however, could not have discovered defendant's negligence until 1993. Thus, the tolling provision of section 340.6, subdivision (a)(1) was not applicable.

Plaintiffs next argue that their actual injury was speculative until the proceeds of the trust were distributed to them in July 2003. They point out that the trust allowed the distribution of trust income and principle to Mrs. Freeman for her care, maintenance, and support, and thus they would not have known whether they would receive any proceeds from the trust until her death.

We find this argument unpersuasive, since it is "the fact of damage, rather than the amount, [that] is the critical factor." (*Jordache, supra*, 18 Cal.4th at p. 752.) Uncertainty as to the amount of damages does not toll the limitations period. (*Jordache*, at p. 752.) However, "nominal" or "contingent" damages do not constitute actual damages. (*Jordache*, at p. 752.) "[C]ontingent injuries are those that do not yet exist, as when an attorney's error creates only a potential for harm in the future. An existing injury is not contingent or speculative simply because future events may affect its permanency or the amount of monetary damages eventually incurred. Thus, we must distinguish between an actual, existing injury that might be *remedied or reduced* in the future, and a speculative or contingent injury that might or might not *arise* in the future." (*Jordache*, at p. 754, internal citations omitted.)

Here, the fact that the trust income and principle could have been distributed to Mrs. Freeman was irrelevant to plaintiffs' cause of action. Since the condominium was never transferred to the trust, it could never be distributed to plaintiffs after Mrs. Freeman's death. Thus, plaintiffs suffered actual injury upon Mr. Freeman's death.

Relying on *ITT Small Business Finance Corp. v. Niles* (1994) 9 Cal.4th 245 (*ITT*), and *International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606 (*Feddersen*), plaintiffs also contend that there is a "distinction between cases where the professional negligence occurred in a transactional, versus a litigation, situation." Thus, they argue that they did not suffer actual injury until finalization

of the underlying transaction, that is, the distribution of the trust res. However, the *Jordache* court overruled *ITT*, holding that "the rule that applies when a plaintiff sustains actual injury from malpractice in transactional matters cannot differ from the rule that applies when claims involve other areas of legal advice and services." (*Jordache, supra*, 18 Cal.4th at p. 763.) The *Jordache* court also concluded that *Feddersen*, which considered when an accountant's allegedly negligent conduct caused injury that triggered the limitations period under section 339, subdivision (1), was irrelevant to the rules for professional negligence actions under section 340.6. (*Jordache*, at pp. 763-764.) Accordingly, we reject plaintiffs' contention.

Plaintiffs next contend that defendant "actively concealed" his wrongful conduct by refusing to provide them with a copy of the will while reassuring them that he was competently handling the matter. Thus, they claim that the statute of limitations was tolled when defendant "willfully conceal[ed] the facts constituting the wrongful act or omission when such facts [were] known to" him. (§ 340.6, subd. (a)(3).) However, defendant was not plaintiffs' attorney. Moreover, as previously discussed, the will and the petition for preliminary distribution informed plaintiffs of any wrongful act or omission by defendant.

In an attempt to avoid defendant's disclosure in the petition for preliminary distribution, plaintiffs assert that defendant had a fiduciary duty to them, thereby requiring that he more explicitly inform them of his wrongful acts or omissions. They claim that defendant's roles as trustee for the testamentary trust of which they were beneficiaries and as attorney to the executor of Mr. Freeman's estate created a fiduciary relationship. There is no merit to this claim.

First, defendant, as trustee of the testamentary trust, owed a fiduciary duty to plaintiffs as beneficiaries. However, this duty is not implicated in the present case, because the condominium was never a trust asset. Second, as attorney to Mrs. Freeman, the executor of Mr. Freeman's estate, defendant did not assume any

fiduciary duties to the potential beneficiaries of the will. (*Goldberg v. Frye* (1990) 217 Cal.App.3d 1258, 1269 [holding that the attorney for the administrator of the estate does not have a duty to beneficiaries].)

Nevertheless, plaintiffs argue that their relationship with defendant contained fiduciary elements. The cases upon which they rely are distinguishable, and do not persuade us that defendant had a fiduciary duty to plaintiffs. In *Morales v. Field, DeGoff, Huppert & MacGowan* (1979) 99 Cal.App.3d 307, the court stated that "[a]n attorney who acts as counsel for a trustee provides advice and guidance as to how that trustee may and must act to fulfill his obligations to all beneficiaries. It follows that when an attorney undertakes a relationship as adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary." (*Id.* at p. 316.) Thus, the court held that the attorney to a trustee has a duty to inform the trustee and the beneficiaries of dual representation in transactions involving the trust. (*Ibid.*) No such duty is at issue in the present case.

In *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, the court held that a fiduciary relationship was created between the attorney for the administrator of the estate and a beneficiary when the attorney informed the beneficiary that he was managing real property on the beneficiary's behalf and would act as his agent in obtaining a purchaser for the property. (*Id.* at p. 429.) In contrast to *Sodikoff*, here defendant neither offered nor provided his services as an attorney to plaintiffs. Similarly, the cases of *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, *Johnson v. Haberman & Kassoy* (1988) 201 Cal.App.3d 1468, *McCann v. Welden* (1984) 153 Cal.App.3d 814, *Baright v. Willis* (1984) 151 Cal.App.3d 303, and *Krusesky v. Baugh* (1982) 138 Cal.App.3d 562 are distinguishable. These cases also involved

the fiduciary duty between an attorney and a client. Here, as plaintiffs concede, there was no attorney-client relationship.

Plaintiffs also argue that the statute of limitations had not run on their cause of action for fraud.

Section 338, subdivision (d) provides that a cause of action for fraud is three years and "is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud . . . ." "Literally interpreted, this language would give the plaintiff an unlimited period to sue if he could establish ignorance of the facts. But the courts have read into the statue a duty to exercise diligence to discover the facts. The rule is that the plaintiff must *plead and prove the facts* showing: (a) Lack of knowledge. (b) Lack of means of obtaining knowledge (in exercise of reasonable diligence the facts could not have been discovered at an earlier date). (c) How and when he did actually discover the fraud or mistake. Under this rule constructive and presumed notice or knowledge are equivalent to knowledge. So, when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his investigation (such as public records or corporation books), the statute commences to run." (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1525, internal quotation and citation omitted.)

Here, as previously discussed, plaintiffs could have discovered the facts constituting this cause of action in 1993 if they had exercised due diligence. Thus, they were required to file their fraud claim in 1996. Since they failed to do so, the trial court properly concluded that this cause of action was barred by the statute of limitations.

III. Disposition

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.